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IN THE

Supreme Court of the United States

October Term, 1984

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner,

v.

ERIC P. VON WIEGEN, ATTORNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

DANIEL J. PERSING
(Counsel of Record) Committee on Professional Standards, Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg., 22nd Floor,
P. O. Box 7013, Capitol Station Annex
Albany, NY 12225
(518) 474-8816

GEORGE B. BURKE
(Counsel for Petitioner) Committee on Professional Standards, Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg., 22nd Floor,
P. O. Box 7013, Capitol Station Annex
Albany, NY 12225
(518) 474-8816

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PETITIONER'S REPLY BRIEF.

Statement.

The petitioner replies to respondent's argument that the petition for writ of certiorari is premature and submits the decision of the Court below on the issue for review was final and the petition was not premature.

Reasons Why Petition Should be Granted.

I.

The Decision Below is Final and the Petition for Writ of Certiorari was not Premature.

The New York Court of Appeals dismissed the charge relating to direct mail solicitation of accident victims. Although the respondent moved for reargument, the motion was untimely and without merit. (See decision of Appellate Division rendered February 15, 1985, made a part of the Appendix.)

At the time the petition was filed, the decision of the Court of Appeals was a final determination of the issue before this Court and remittitur was solely for reconsideration of the sanction for a separate issue. This Court has followed a pragmatic approach to the question of finality. The test is whether the appellate court has fully adjudicated the question and it is not subject to further review. *Department of Banking v. Pink,* 317 U. S. 264 (1942); *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548 (1945). The fact that separate and unresolved issues are pending in the Court and subject to further proceedings does not render the judgment unfinal. When all that remains is the ministerial act of entering judgment on the remittitur, the judgment is final for purposes of Supreme Court review. *Hudson Distributors v. Eli Lilly & Co.,* 377 U. S. 386, 389, n. 4 (1964). A retrial on the question of punishment and not on the question of guilt renders the judgment final within the meaning of the jurisdictional parameters. *Brady v. State of Md.,* 373 U. S. 83 (1963).

There are no further proceedings possible in this action with regard to determining the right of direct mail solicita-

tion of accident victims. The judgment of the Court of Appeals with regard to the question sought to be reviewed cannot be changed on remittitur. *See, Barton Realty Corp. v. Mangan,* 25 A. D. 2d 730, 268 N. Y. S. 2d 869 (1st Dep't 1966).

Even if *arguendo,* the respondent's position were correct, the objection is rendered moot by the final determination of the Appellate Division imposing censure for the sole remaining charge. (See Appendix.)

Conclusion.

For the above-stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. PERSING
(Counsel of Record)
Committee on Professional Standards
Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg.
22nd Floor, P. O. Box 7013
Capitol Station Annex
Albany, New York 12225
(518) 474-8816

GEORGE B. BURKE
(Counsel for Petitioner)
Committee on Professional Standards
Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg.
22nd Floor, P. O. Box 7013
Capitol Station Annex
Albany, New York 12225
(518) 474-8816

APPENDIX.

Decision of Appellate Division, Rendered February 15, 1985.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

February 15, 1985

IN THE MATTER

OF

ERIC P. VON WIEGEN, Attorney,

Respondent,

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

By decision dated April 6, 1984, this court suspended respondent from the practice of law for six months because he 1) solicited by mail the victims and families of the Hyatt Regency Hotel disaster in Kansas City, Missouri in July 1981, 2) made deceptive and misleading statements in the solicitation letters to the effect that a "litigation coordinating committee" had been formed to assist the disaster victims and that many accident victims and/or

their families had requested representation by respondent, and 3) used a trade name, i.e., "The Country Lawyer" (*Matter of von Wiegen,* 101 AD2d 627). Thereafter, the Court of Appeals stayed the suspension and subsequently modified this court's order by dismissing the charges with respect to direct mail solicitation and use of a trade name. The matter was remitted for reconsideration of the sanction to be imposed on the sustained charge of making deceptive and misleading statements in the solicitation letters (*Matter of von Wiegen,* 63 NY2d 163).

Respondent now moves for reargument or renewal of his original motion to disaffirm the referee's report with respect to the charge of making deceptive and misleading statements. In the alternative, he requests that this court impose no sanction with respect to such charge or, if a sanction is to be imposed, that it not involve a suspension from the practice of law. Initially, we deny the motion for reargument or renewal because, in light of the Court of Appeals decision, the former is untimely and without merit, and the latter is unsupported by assertions of fact which could not have been made at the time of the original motion to disaffirm (*see, e.g., Foley v. Roche,* 68 AD2d 558, 567-568).

With respect to the appropriate sanction, we first note that the use of deceptive and misleading statements in the solicitation letters constitutes serious misconduct which warrants imposition of a penalty. The Court of Appeals has confirmed this court's findings that respondent's communications were indeed deceptive in that 1) respondent and his secretary were the only members of the purported "litigation coordinating committee", and 2) only some, and not many, families had contacted respondent, and none had in fact requested representation (63 NY2d 163, 176). We strongly condemn respondent's conduct in the making of such misleading statements especially when it is

considered that they were directed to disaster victims and their families.

Inasmuch as the Court of Appeals has dismissed two of the three charges of unprofessional conduct underlying the six-month suspension initially imposed, and considering respondent's previously unblemished record, we conclude that a censure of respondent would now be an appropriate sanction.

Respondent censured.

Mahoney, P.J., Kane, Casey and Weiss, JJ., concur.